DOLOMITE INDUSTRIES CO. SDN. BHD.

v.

PROMIX SDN. BHD & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[CIVIL SUIT NO. C23-2395-86]
14 JUNE 1989

CIVIL PROCEDURE: *Garnishment - Show cause proceedings - Interveners - Agreement for set-off of claims between garnishee and interveners - Effect on garnishment - Order of SAR - Whether show cause proceedings can be disposed of summarily - Principles applicable - Rules of the High Court 1980, O. 49, r. 6(1), (2).*

The plaintiffs D having obtained judgment for a sum of RM773,896.47 against Promix Sdn. Bhd., P (the judgment debtor), obtained a garnishee order nisi against Shimizu Construction Co. Ltd. for all debts due or accruing to P.

Although in the show cause proceedings under O. 49 Rules of the High Court, S conceded that there was a sum of RM534,456.75 due to P, S claimed that as there was an amount of RM254,544 (the said sum) owing to CMCM for cement supplied by S to P, this said sum could not be garnished. The Senior Assistant Registrar, SAR, ordered that sum of RM74,356.32 was to be paid by S to D and the balance to P in receivership.

The dispute resolved around the contention of both Counsels of S and CMCM that the SAR should not have disposed of the matter summarily and that he had erred in ruling that the RM534,456.75 be paid to the judgment debtor without deduction of the said sum.

Held:

[1] A reading of the agreement between S & P would indicate that only monies paid by S to CMCM for cement purchased could be used to set off against S's account with P. Monies paid does not include monies payable. As the said sum was not paid, that amount could not be set off against the RM534,456.75.

[2] As this was not a difficult point of law, the SAR was justified in disposing of the issues summarily.

[Application of S and CMCM dismissed with costs.]

Cases referred to:
Craig v. Kanssen [1943] 1 KB 256
Cow v. Casey [1949] 1 KB 481

Legislation referred to:
Rules of the High Court 1980, O. 49 r. 6

For the judgment creditor - Lee Chee Meng; M/s. Shearn Delamore & Co.
For the judgment debtor - K. Kanagasingam; M/s. Allen & Gledhill
For the garnishee - J. Shanta Lourdes; M/s. Azman Davidson & Co.
For the interveners:
For Highway Quarry Sdn. Bhd. - Philip Choong; M/s. Philip Choong & Co.
For CMCM Perniagaan Sdn. Bhd. - Rita Phuah; M/s. Norendra & Yap
For UMW Industries Sdn. Bhd. - Usharani Balasingam; M/s. Lewis & Co.

JUDGMENT

VC George J:

Having obtained judgment against the defendant (Promix) for RM773,896.47 interest and costs on 26 November 1986, the plaintiff (Dolomite) obtained a garnishee order nisi against Shimizu Construction Co. Ltd. (Shimizu) in respect of "all debts due or accruing on the judgment debtor (Promix) to answer the said judgment debt".

Shimizu filed two affidavits affirmed by its project manager Shigeru Usui in response to the show cause order being encls. (21) and (22) in the Court file.

A somewhat passive stand was taken by Shimizu. They appeared to regard the show cause proceedings as if it was an interpleader proceedings in respect of moneys in their hands in respect of which there was more than one claimant and in the outcome of which proceedings they had no real interest.

By encl. (21) Shigeru Usui concedes that Shimizu had a contract with Promix for the supply of ready-mixed concrete and then come paras. 5 and 6 of his affidavit:

> 5. Pursuant to this contract there is at present due to the judgment debtor a total sum of RM534,456.75.
>
> 6. However, by clause 5(j) of the abovementioned contract the garnishee did agree to pay directly to the sub-supplier for the supply of cement to Promix Sdn. Bhd. which direct payment would immediately be off-set from any amounts payable to Promix Sdn. Bhd. This clause is annexed hereto and marked as Exhibit "SU-1".

The affidavit goes on to state that in respect of ready mixed concrete thus supplied there was out of the said amount of RM534,456.75 due to CMCM Perniagaan Sdn. Bhd. (CMCM) RM254,544 for cement supplied at the instance of Shimizu to Promix. Para. 10 of encl. (21) states:

> 10. I am advised by my solicitors and verily believe that such money is due to the said sub-supplier and not to the judgment debtor and therefore the sum due to the said sub-supplier CMCM Perniagaan Sdn. Bhd. of RM254,544 should not be garnished.

In the said affidavits reference is also made to claims of certain other companies to portions of the said RM534,456.75.

This judgment is however restricted to CMCM's claim *vis-a-vis* the order that the learned Senior Assistant Registrar made at the show cause proceeding and to the submissions made by Counsel on behalf of Shimizu at the hearing of the appeal.

Now the Senior Assistant Registrar, after hearing the parties including CMCM and the said claimants who had sought to be heard as interveners, ordered that out of the said RM534,456.75, RM74,356.32 was to be paid by the garnishee Shimizu to Dolomite the judgment creditor and the balance to the "judgment debtor in receivership".

Shimizu, consistent with its attitude of not being concerned with the outcome, did not appeal against the order. Much later it did however apply unsuccessfully to appeal out of time. CMCM however did file a notice of appeal in good time.

At the hearing of the appeal I heard En. Lee Chee Meng of Counsel for Dolomite, En. Kumar Kanagasingam who emphasised that he was Counsel for "the judgment debtor in receivership", Cik Rita Phuah of Counsel for CMCM and En. W.S.W. Davidson of Counsel for Shimizu. I pause to note that there were objections to the right of Shimizu's Counsel En.

Davidson being heard but he was allowed by me to address the Court on his submission that the Court should declare that the order of the learned Senior Assistant Registrar which affected his clients was a nullity, and as such it was not necessary to appeal from it and that Counsel should be heard on the submissions that the Court had the inherent jurisdiction to and should set such an order aside - *Craig v. Kanssen* [1943] 1 KB 256 is the authority he relied on for that proposition. In short En. Davidson's contention was that in a show cause in garnishee proceeding the Court may (i) find that there is an amount due and payable by the garnishee to the judgment debtor and may make the order nisi absolute in respect of that amount in which case such amount would be payable forthwith to the judgment creditor or (ii) find that there is no money owing from the garnishee to the judgment debtor in which case the application would be dismissed. En. Davidson said that where an amount was found due to the judgment debtor, the Court has to consider the claims of the interveners before deciding whether to make the order nisi absolute. There is no quarrel with these contentions.

It was also his contention that the Court had no jurisdiction in such a show cause application to order that the amount sought to be garnished, be paid over to the judgment debtor and accordingly such an order as was made was a nullity.

The sub rules of r. 6 of O. 49 RHC are as follows:

> 6. (1) If in garnishee proceedings it is brought to the notice of the Court that some other person than the judgment debtor is or claims to be entitled to the debt sought to be attached or has or claims to have a charge or lien upon it, the Court may order that person to attend before the Court and state the nature of the claim with particulars thereof.
>
> (2) After hearing any person who attends before the Court in compliance with an order under para. (1), the Court may summarily determine the questions at issue between the claimants or make such other order as it thinks just, including an order that any question or issue necessary for determining the validity of the claim of such other person as is mentioned in para. (1) be tried in such manner as is mentioned in r. 5.

These sub-rules allow the Court to consider and make orders that it considers just in respect of the claims of persons other than the judgment debtor to the debt sought to be attached. In the instant case such claims were put up by each of the interveners. There was also the affidavit of one Gong Wee Ning (encl. (43)). He pointed out that Perwira Habib Bank was the holder of a debenture issued by the judgment debtor which had eventually crystalised and on the 22 June 1987, he and three others were, pursuant to the debenture, appointed the receivers and managers of Promix. Prior to that date the decree nisi had been made but which of course had not at that stage been made absolute. He contends that the effect of Promix being placed under the receivership is that all creditors including Dolomite would thereafter be ranked as unsecured creditors as against the debenture holder who is to be considered as secured creditor with priority over the unsecured creditors. Mr. Gong accordingly asked for the amounts attached in the hands of Shimizu to be paid over to the "judgment debtor in receivership" - in other words to the receivers and managers.

En. Kumar Kanagasingam's contention amounts to suggesting that the contents of En. Gong's affidavit has the effect of bringing to the Court's notice within the meaning of the said r. 6(1) that Perwira Habib Bank the holder of the debenture has a claim to the whole of the debt sought to be attached and that accordingly the whole amount should be made over to the receivers and managers who were appointed pursuant to the debenture - primarily to call in the assets of Promix.

For CMCM it was contended that they had indeed supplied cement in respect of which Shimizu owed them the RM254,544. Although in the affidavits filed on their behalf they apparently say that they know nothing of and are not concerned with the agreement referred to herebefore between Shimizu and Promix it is quite obvious that their claim is for that RM254,544 out of the RM534,456.75 - otherwise their intervening in the garnishment would be meaningless. Cik Rita Phuah's contention that in as much as the receivers have relied on the affidavit filed on behalf of Shimizu her clients are also entitled to rely on them, has merit.

In the final analysis what both En. Davidson for Shimizu and Cik Rita Phuah for CMCM want is for the Court to hold that the learned Senior Assistant Registrar should not have disposed of the matters summarily as he did and that in any event the learned Senior Assistant Registrar erred in ruling that the RM534,456.75 be paid to the judgment debtor without deduction of the RM254,544 being the price of the cement that CMCM had supplied to Promix. It seems to me in the context of the CMCM's intervention and as supported by Shimizu albeit passively before the Senior Assistant Registrar and vigorously before me, that was the only issue canvassed.

That issue turned on the meaning and effect to be given to the agreement of 11 September 1985, between Shimizu and Promix and in particular to clause 5(j) hereof. It could be argued that is a difficult question of law and as such not suitable to be disposed of summarily. In *Cow v. Casey* [1949] 1 KB at p. 481 Lord Green MR said with reference to an O. 14 application that where the issue was a point of law, however difficult it is, once it is understood and the Court is satisfied that it is really unarguable, it will give final judgment. That principle in my judgment is applicable in garnishment show cause proceedings or any other proceedings that involve a summary disposal of the issues or questions raised.

The relevant portion of the agreement is exhibited to encl. (21). clause 5(j) of the agreement is as follows:

> (j) The purchaser is to procure cement on behalf of the supplier at a price of RM160 per metric ton delivered to the batching plants in Kuala Lumpur. Any monies paid by the purchaser for the cement purchased on behalf of the supplier would be used to off-set against the purchaser's account with the supplier for the supply of readymixed concrete, such account to be on 60 (sixty) days terms.

It is monies paid by Shimizu for cement purchased from CMCM that could be used to off-set against Shimizu's account with Promix. Monies paid in my judgment does not include monies payable. The RM254,544 was not paid and accordingly that amount cannot be off-set against the RM534,456.75.

This I do not consider a difficult point of law and in any event once understood could be adjudged upon summarily as was done in the instant case. The learned Senior Assistant Registrar was justified in disposing of the issues summarily. The order made by him will stand. En. Davidson's application made on behalf of Shimizu is dismissed with costs. CMCM's application encl. (53) is dismissed with costs.

Also found at [1991] 3 CLJ 1361